

probably covered by the Act, bring suit against their employer for unpaid overtime compensation which they claim is due them. If the court finds that the employees were performing work subject to the Act, they can recover for the period commencing May 14, 1947, even though the employer pleads and proves that his failure to pay overtime was in good faith in conformity with and in reliance on the opinion of X Agency, because for that period the defense would, under section 10 of the Portal Act, have to be based upon written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy of the Administrator of the Wage and Hour Division. The defense would, however, be good for the period from January 1, 1947 to May 14, 1947, and the employer would be freed from liability for that period under the provisions of section 9 of the statute.

§ 790.14 "In conformity with."

(a) The "good faith" defense is not available to an employer unless the acts or omissions complained of were "in conformity with" the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy upon which he relied.⁹⁴ This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary.

(b) An example of an employer not acting "in conformity with" an administrative regulation, order, ruling, approval, practice, or enforcement policy is a situation where an employer receives a letter from the Administrator of the Wage and Hour Division, stating that if certain specified circumstances and facts regarding the work performed by the employer's employees exist, the employees are, in his opinion, exempt from provisions of the Fair Labor Standards Act. One of these hypothetical circumstances upon which the opinion was based does not exist regarding these employees, but the employer, erroneously assuming that this

circumstance is irrelevant, relies upon the Administrator's ruling and fails to compensate the employees in accordance with the Act. Since he did not act "in conformity" with that opinion, he has no defense under section 9 or 10 of the Portal Act.

(c) As a further example of the requirement of conformity, reference is made to the illustration given in § 790.13(b), where an employer, who had a contract with the X Federal Agency covering the period from January 1, 1947 to January 1, 1948, received an opinion from the agency that employees working on the contract were not covered by the Fair Labor Standards Act. Assume (1) that the X Agency's opinion was confined solely and exclusively to activities performed under the particular contract held by the employer with the agency and made no general statement regarding the status under the Act of the employer's employees while performing other work; and (2) that the employer, erroneously believing the reasoning used in the agency's opinion also applied to other and different work performed by his employees, did not compensate them for such different work, relying upon that opinion. As previously pointed out, the opinion from the X Agency, if relied on and conformed with in good faith by the employer, would form the basis of a "good faith" defense for the period prior to May 14, 1947, insofar as the work performed by the employees on this particular contract with that agency was concerned. The opinion would not, however, furnish the employer a defense regarding any other activities of a different nature performed by his employees, because it was not an opinion concerning such activities, and insofar as those activities are concerned, the employer could not act "in conformity" with it.

§ 790.15 "Good faith."

(a) One of the most important requirements of sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal

⁹⁴Statement of Senator Cooper, 93 Cong. Rec. 4451; message of the President to Congress on approval of the Act, May 14, 1947, 93 Cong. Rec. 5281.